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No. 88-867

In the Supreme Court of the United States

OCTOBER TERM, 1988

ANN R. WILLNER,
Petitioner,

vs.

UNIVERSITY OF KANSAS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

Cases

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PETITIONER'S REPLY BRIEF

Respondent University of Kansas, in its opposing brief, seeks to mislead this Court in its statement of the case. It first wrongly alleges that the University's Alumni Association is a "separate entity from the University of Kansas" (Brief in Opp., p. 3). In fact, the Alumni Association is held by the University itself to be a constituent unit of its administration, as the University of Kansas Telephone Directory, page 7, shows. *See* Appendix A, p. A1, *infra*. Respondent then transposes the grounds of petitioner's second motion for disqualification from Judge Rogers' position on the Board of Governors of respondent University of Kansas' Law School to a position on an alumni law society (Brief in Opp., p. 3). In fact, Judge Rogers was listed in the 1984 Almanac of the Federal Judiciary as on the "Board of Governors, Univ. of Kan.

Law School (Past President)." In his Order of March 11, 1985 denying petitioner's second motion for disqualification, he did not take issue with petitioner's designation of his position as such. *See* Brief in Opp., p. A20.

Respondent University of Kansas argues that this Court in *Liljeberg v. Health Services Corp.*, ... U.S. ....., 108 S. Ct. 2194, 2206, 100 L. Ed. 2d 855, 877 (1988) recognized timeliness as an implicit requirement under § 455 (Brief in Opp., p. 4). If this is so, then it is more than ever necessary, contrary to respondent's inference, for this Court to grant petitioner's request for a writ of certiorari. The Tenth Circuit's final decision in this case is in direct conflict with the standard for timeliness mandated in *Liljeberg*.

In *Liljeberg*, this Court affirmed the finding below of the Fifth Circuit that a motion for disqualification was timely filed by a party after it first learned, ten months past the appeal, of the grounds upon which the trial judge's impartiality might reasonably be questioned. Petitioner, according to this standard, filed her motions for disqualification timely, since she filed them promptly after she learned of each post held by Judge Rogers in the University of Kansas.

Given the standard in *Liljeberg*, there is no basis for respondent University's attempt to hold to the standard of time of filing a case (Brief in Opp., p. 7). It is significant that respondent in its appellee brief to the Tenth Circuit did not raise an issue of untimeliness; nor did Judge Rogers in his orders refusing to disqualify himself. *See* Brief in Opp., Appendices A and C. The issue of untimeliness was raised for the first time by the Tenth Circuit in its ruling denying petitioner's appeal on June 1, 1988.

Petitioner filed a petition for rehearing to the Tenth Circuit on June 20, 1988, three days after the *Liljeberg* decision came down from this Court. The Tenth Circuit necessarily had knowledge of *Liljeberg* and its direct relevance to this case when it denied rehearing on July 25, 1988.

Respondent University of Kansas follows the Tenth Circuit in lack of consistency. They state the only issue to be that of timeliness, precluding any decision on the merits of disqualification, while nonetheless addressing the merits. The cases of *Brody v. President and Fellows of Harvard College,* 664 F. 2d 10 (1st Cir. 1981), *cert. denied,* 455 U.S. 1027, 102 S. Ct. 1731, 72 L. Ed. 2d 148 (1982) and *Parrish v. Board of Commissioners of Alabama State Bar,* 524 F. 2d 98, 104 (5th Cir. 1975) (en banc), *cert. denied,* 425 U.S. 944, 96 S. Ct. 1685, 48 L. Ed. 2d 188 (1976) cited by respondent (*See* Brief in Opp., pp. 7-8) in support of the trial judge's refusal to disqualify himself cannot be compared to the circumstances of this case. The judge in *Brody* was no more than an alumnus or graduate of Harvard College. The activities of the judge in *Parrish* found insufficient for disqualification were presidency of the county bar association of Montgomery County and acquaintanceship or friendship with witnesses and defense counsel (*See Brody, supra,* p. 11 and *Parrish, supra,* p. 104). As petitioner argued in her second motion for disqualification, the trial judge's offices and services as director of the Alumni Association of respondent University, as President of the Board of Governors of the Law School of respondent University, attest to the sustained personal concern and interest in respondent University of Kansas (*See* Appendix B, *infra,* pp. A3-A5). They undeniably give rise to the appearance of impropriety.

These relationships, together with the trial judge's directorship of respondent University's Endowment Association, not only violate § 455(a) but also fall within the purview of § 455(b)(4). Should respondent University of Kansas have been found guilty of discrimination on the ground of sex, some law abiding alumni and particularly female alumnae might fail to contribute to respondent University.

Defendant's argument that the decision of the trial and appellate courts "was correct and fair" clearly fails in the light of *Liljeberg*. Both the opinion and the dissent emphasize that the objective of § 455 is "to promote public confidence in the impartiality of the judiciary," *supra*, pp. 872, 879). When a decision of an appeals court flies in the face of a decision of this Court, public confidence in the judiciary is undermined rather than promoted. The need for this Court to review the action below is indisputable. For all the reasons above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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University Administrative Offices

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Lawrence Campus
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When calling from outside, dial 86 plus the five digits listed below. The Lawrence KANS-A-N prefix is 564. The university's area code is 913.

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Assoc. Vice Chancellor, Brower R. Burchill
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Assoc. Vice Chancellor, George Woodyard
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Asst. to the Vice Chancellor, June Michal
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Asst. to the Vice Chancellor, Janet Riley
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Administrative Asst., Carol Prentice
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See Study Abroad 4-3742

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Asst. Director, Carla Rasch
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Asst. Director, James Stinson
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Asst. Director, Diane Bergquist-Lindeman
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Allied Health, School of
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Director of Membership Development, B.J. Pattee 4-4760
Director, K.C. Office, Pat Head
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Director, Kansas Honors Program, Jerry Lewis. 4-4760
Coordinator, Alumni Minority Affairs, Eunice Stallworth 4-4760
Director of Membership Services, Donna Neuner. 4-4760

Asst. Records Supervisor, Sheri Basore 4-4760

Alumni Magazine
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Animal Care Unit
B054 Mal 4-5587
See also University Animal Resources

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107 Sp 4-4245
Biological Anthropology, Laboratory of
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Michael Crawford. 4-4170

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204 Lipp 4-4606
Admissions Officer, Charles A. Sauer
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See Linguistics, Dept. of. 4-3450

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APPENDIX B

(Filed January 2, 1985)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 79-4069-W

ANN R. WILLNER,
Plaintiff,

v.

UNIVERSITY OF KANSAS,
Defendant.

MOTION FOF DISQUALIFICATION AND STAY OF ACTION

COMES NOW plaintiff pro se Ann R. Willner and, in accordance with 28 U.S.C. 455(a) moves the Court to disqualify itself in this proceeding on the grounds that the impartiality of Judge Richard D. Rogers is reasonably in question.

In support whereof, plaintiff pro se states that she has recently been apprised of the fact that Judge Richard D. Rogers serves and has served during the pendency of this action on the Board of Governors of the Law School of defendant University of Kansas, such service including having held the post of President of said Board of Governors of the Law School of defendant University of Kansas (see Exhibit A attached).

Furthermore, Judge Richard D. Rogers, in these capacities as member and President of the Board of Governors of the Law School of defendant University of Kansas, has of necessity closely interacted with and does of necessity closely interact with administrators of defendant University of Kansas and most notably in these capacities with the Dean of the Law School, Michael J. Davis. The dean of defendant University of Kansas Law School, Michael J. Davis, immediately prior to assuming his current post, served as General Counsel for defendant University of Kansas and in that capacity served in the instant case as attorney for defendant University of Kansas.

Pursuant to the provision of 28 U.S.C. 455(a), disqualification is required since any reasonable person would conclude that under these circumstances a judge's impartiality is reasonably in question. Any reasonable person would conclude that any individual serving on a board of governors of an institution and serving as president of a board of governors of an institution would of necessity have a strong personal interest in, partiality to and bias in favor of that institution.

It therefore follows that a reasonable person, in full knowledge of the fact that Judge Rogers is and has been serving on the Board of Governors of the Law School of the University of Kansas concurrently with the pendency of this case in his court, this case in which the University of Kansas is defendant, must reasonably question the impartiality of Judge Rogers in said proceeding.

In further support of this motion, plaintiff pro se states the fact, as indicated in Exhibit B attached, that during the pendency of this case, Judge Richard D. Rogers

has also served as a director of the Alumni Association of defendant University of Kansas. As a director of the Alumni Association of the University of Kansas immediately prior to and during the pendency of this action, Judge Rogers has of necessity worked closely with the administrators of defendant University of Kansas who are agents of defendant university in this action.

A sharp distinction is generally and widely recognized between mere and ordinary membership in a university alumni association and the special status of director of a university alumni association. As is generally and widely known, nomination and election to a directorship of a university alumni association are a consequence of and contribute to active and sustained personal concern with and for the welfare of that university, active and sustained personal efforts on its behalf, and strong and sustained loyalty to it.

It therefore follows that any reasonable person, in full knowledge of the circumstances of Judge Rogers' service as a director of the Alumni Association of defendant University of Kansas immediately prior to and concurrently with the pendency of this case in which the University of Kansas is defendant, must conclude that Judge Rogers' impartiality in the instant case must reasonably be in question.

Because of any and all of the abovementioned facts of Judge Rogers' service on the Board of Governors of the Law School of defendant University of Kansas, of Judge Rogers' service as a director of the Alumni Association of defendant University of Kansas, of Judge Rogers' close association and interaction, of necessity stemming therefrom, with administrators and agents of

defendant University of Kansas, plaintiff prays the Court to take the proper action by disqualifying itself in this proceeding in accordance with 28 U.S.C. 455(a) and in order to avoid the appearance of impropriety. Plaintiff further prays a stay of all action in this proceeding until this motion has been ruled upon.

/s/ Ann R. Willner
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